

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ESTHER AXELSON,

Plaintiff,

vs.

HARTFORD INSURANCE COMPANY OF THE
MIDWEST,

Defendant.

Case No. 2:11-cv-01827-RCJ-GWF

ORDER

Motion for Protective Order (#39)

This matter is before the Court on Plaintiff's Emergency Motion for Protective Order Regarding the Deposition of G. Michael Elkanich, M.D. (#39), filed on March 13, 2013; Defendant Hartford Insurance Company's Response to Plaintiff's Emergency Motion for Protective Order (#43), filed on March 20, 2013; and Plaintiff's Reply to Defendant's Opposition to Plaintiff's Emergency Motion for Protective Order (#45), filed on March 25, 2013. The Court conducted a hearing in this matter on March 26, 2013.

BACKGROUND AND DISCUSSION

Plaintiff Esther Axelson seeks recovery of underinsured motorist coverage (UIM) benefits from her automobile insurance company, Hartford, for bodily injury damages she allegedly sustained in a motor vehicle accident that occurred on March 18, 2009. Plaintiff also seeks recovery of damages for Defendant's alleged bad faith refusal to pay the UIM limits of the policy. One of the disputed issues in this case is whether Plaintiff is a candidate for cervical spine surgery as a result of her accident injuries. Plaintiff's treating orthopedic physician and retained medical expert witness, Dr. Elkanich, opines that she is. Dr. Elkanich has provided a written report regarding his opinion pursuant to Fed.R.Civ.Pro. 26(a)(2)(B). His opinion is based on his review

1 of Plaintiff's medical records, her deposition testimony and his examination of the Plaintiff.
2 Defendant's medical expert witness, Dr. Anthony Serfustini, who is also an orthopedic physician,
3 opines that Plaintiff is not a candidate for surgery.

4 The issue on this motion is Dr. Elkanich's fees for taking his deposition. Dr. Elkanich
5 charges \$1,500 per hour for his deposition. He also requires that \$1,500 be paid before he will
6 appear for his deposition. Dr. Elkanich's deposition was initially noticed for January 17, 2013.
7 Defendant Hartford tendered the \$1,500 to Dr. Elkanich and deposed him for approximately one
8 hour on that date. Dr. Elkanich requested that the deposition be terminated so that he could attend
9 to his medical duties. Defendant agreed. Defendant subsequently rescheduled Dr. Elkanich's
10 deposition for April 9, 2013. Dr. Elkanich demands that he be paid another \$1,500 in advance of
11 his rescheduled deposition. He also demands that Defendant execute a contract to pay his
12 deposition fees before he will appear for the rescheduled deposition. Defendant states in its
13 opposition that its medical expert, Dr. Serfustini, charges \$1,400 an hour for taking his deposition.

14 Hartford now takes the position that Dr. Elkanich may not be entitled to a fee for his
15 deposition, beyond the \$40.00 witness appearance fee authorized by 18 U.S.C. §1821. Hartford
16 argues that Dr. Elkanich was Plaintiff's treating physician and is not entitled to an expert witness
17 fee for deposition testimony about his examination, diagnosis, treatment or prognosis rendered
18 during the ordinary course of providing medical treatment. Hartford relies on a line of cases,
19 including *Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 198 (N.D. Ohio 1998) and *Baker v. Taco Bell*
20 *Corp.*, 163 F.R.D. 348, 349 (D. Colo. 1995), which hold that a treating physician is not entitled to
21 be paid an expert witness fee by the deposing party pursuant to Fed.R.Civ.Pro. 26(b)(4)(E)(i).
22 Other federal courts, however, hold that treating physicians are entitled to be paid a reasonable
23 expert's fee for time spent in deposition. See *Coleman v. Dydula*, 190 F.R.D. 320, 321 (W.D.N.Y.
24 1999); *Scheinoltz v. Bridgestone/Firestone, Inc.*, 187 F.R.D. 221, 222 (E.D. Pa. 1999); and *Magee*
25 *v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645-46 (E.D.N.Y. 1997).

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1 This Court agrees with the interpretation of Rule 26(b)(4)(C)(i)¹ set forth in *Hoover v.*
 2 *United States*, 2002 WL 1949734 (N.D.Ill. 2002). The court noted that Rule 26(a)(2)(A) requires a
 3 party to disclose to other parties the identity of any witness it may use at trial to present evidence
 4 under Federal Rule of Evidence 702, 703, or 705. Rule 26(a)(2)(A) includes witnesses who may
 5 provide expert testimony at trial, but who are not retained or specially employed to testify at trial
 6 and are therefore not required to provide a written report and other information pursuant to Rule
 7 26(a)(2)(B). Treating physicians are an example of such experts. *Hoover* further noted that
 8 26(b)(4)(C)(i) states that the expert is entitled to a reasonable fee for responding to discovery under
 9 Rule 26(b)(4)(A) which states:

10 A party may depose any person who has been identified as an expert
 11 whose opinions may be presented at trial. If Rule 26(a)(2)(B)
 12 requires a report from the expert, the deposition may be conducted
 only after the report is provided.

13 As *Hoover* explained, the first sentence of Rule 26(b)(4)(A) permits the deposition of “any
 14 person who has been identified as an expert whose opinion may be presented at trial.” (emphasis
 15 added). That language plainly relates back to Rule 26(a)(2)(A).” *Id.*, at *5. The court therefore
 16 stated:

17 Based on the foregoing analysis, we conclude that treating physicians
 18 who may be called to testify clearly fall within the definition of an
 19 expert as that term is used in Rule 26(a)(2)(A). The fact that the
 20 report requirement imposed by Rule 26(a)(2)(B) does not apply to a
 21 physician testifying solely as a treater does not change the fact that in
 22 testifying based on his or her work as a physician, the treater will be
 23 calling upon specialized knowledge that can only be provided under
 Rule 702. And, because a treating physician will offer expert
 testimony under Rule 702, the treater is included within the class of
 experts who, if deposed as permitted by Rule 26(b)(4)(A), must be
 paid a reasonable fee by the party taking the deposition under Rule
 26(b)(4)(C)(i).

24 *Hoover*, 2002 WL 1949734, at *6.

25 ...

27 ¹ The provision regarding payment of the expert’s fee is now contained in Rule
 28 26(b)(4)(E)(i).

1 Unlike some other decisions which rely on policy reasons to hold that treating physicians
2 should be paid a reasonable expert's fee for their depositions, the *Hoover* court based its analysis
3 on the plain language of the rule and rejected decisions such as *Baker v. Taco Bell Corp.* as having
4 misread the rule.

5 *Coleman v. Dydula*, 190 F.R.D. 320, 324 (W.D.N.Y. 1990) states that in determining what
6 constitutes a "reasonable fee" under Rule 26(b)(4)(C), federal district courts have considered such
7 factors as (1) the witness's area of expertise, (2) the education and training that is required to
8 provide the expert insight that is sought, (3) the prevailing rates for other comparably respected
9 available experts, (4) the nature, quality and complexity of the discovery responses provided, (5)
10 the cost of living in the particular geographic area, (6) the fee being charged by the expert to the
11 party who retained him, (7) fees traditionally charged by the expert on related matters, and (8) any
12 other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.
13 Neither party has provided substantial information regarding the factors set forth in *Coleman*. In
14 view of the fact that Defendant's retained trial expert witness, Dr. Serfustini, charges \$1,400 per
15 hour for his deposition, and counsels' representation that these fees are in line with those charged
16 by similarly qualified expert witnesses in this community, the Court concludes that Dr. Elkanich's
17 hourly rate of \$1,500 for his deposition in this case is reasonable. The Court expresses no opinion
18 as to what the reasonable hourly rate would be for Dr. Elkanich or another similarly qualified
19 physician who was being deposed solely in his or her capacity as a treating physician. Arguably,
20 the reasonable hourly rate may be different if the physician is merely deposed about his
21 examination findings, diagnosis and treatment rendered during the ordinary course of providing
22 patient care.

23 The Court further orders Defendant to pay Dr. Elkanich \$1,500 in advance of his
24 rescheduled deposition. The \$1,500 shall cover the first hour of Dr. Elkanich's deposition. If the
25 deposition exceeds one hour, then Defendant shall pay Dr. Elkanich for the additional time based
26 on an hourly rate of \$1,500, i.e. if the deposition goes an additional half hour, Defendant shall pay
27 an additional \$750.00. Dr. Elkanich should make himself available for up to two hours of
28 deposition time. Defendant shall promptly pay Dr. Elkanich for any additional compensation that

1 may be owed for the deposition. The Court recommends that Dr. Elkanich and counsel schedule
2 the deposition at a date and time that avoids or minimizes interference with Dr. Elkanich's medical
3 practice. Finally, Defendant or its counsel are not required to execute a contract or agreement with
4 Dr. Elkanich regarding his deposition. The Federal Rules of Civil Procedure, and this Court's
5 orders in accordance therewith, govern the conditions under which the deposition is taken.
6 Accordingly,

7 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Protective Order is **granted**, in
8 part, and subject to the foregoing provisions of this order.

9 DATED this 26th day of March, 2013.

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12 GEORGE FOLEY, JR.
13 United States Magistrate Judge
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